Supreme Court, U.S.
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No. 83-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

v.

AIR PRODUCTS AND CHEMICALS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's misstatements and reargu-ments of the District Court's findings of fact and conclusions of law present any basis for review by this Court when no conflicting judicial precedents on these conclusions are present.

2. Whether confirming an award of reasonably foreseeable damages in the amount of $73,339.12 to a damaged consignee/holder of a bill of lading will somehow discourage settlements of shipping claims, discourage safety or encourage forum shopping.

3. Whether a Circuit Court Judge's voluntary recusal from the Fifth Circuit panel hearing this appeal was in any way improper or prejudicial to petitioner.

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BRIEF IN OPPOSITION

Respondent urges that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered December 16, 1983 be denied for the reasons set forth below.[1]

[1] In compliance with this Court's Rule 28.1, corporate respondent submits the following information concerning its parent, subsidiaries (except wholly owned) or affiliates that are publicly owned (in whole or in part) corporations. Air Products has no parent and owns an interest in Sociedad Espanola de Carburos Metalicos SA, a Spanish Corporation and Daido Sanso K.K. (a Japanese Company).

ARGUMENT

Petitioner's Refusal To Accept All Earlier Opinions Of This Court Consistent With The Result Below And Other Consistent Opinions From Other Courts Of Appeal Provides No Basis For Granting The Writ

The only ground which seems to have been seriously advanced by petitioner as to why certiorari should be granted in this case is an unwarranted, but incessant unhappiness with the fact findings made by the District Court Judge in this case (Chief Judge John V. Parker, M.D.La., Appendix A.1-A-8) and the application of law to those facts drawn from prior appellate and district court opinions which are entirely consistent with the results herein (Fifth Circuit Opinion of December 16, 1983, Judges Davis and Tate, Appendix, A.11-A.21). No split of authority at the Court of Appeals level is presented and mere reargument of petition's earlier unsuccessful legal and factual arguments provides no basis for review by this Court. The decision below gave full consideration to the issues emphasized by petitioner, deciding them correctly and fairly.

Petitioner misstates the conclusions of fact found by the District Court and affirmed by the Court of Appeals. Petitioner erroneously states that the bills of lading issued to Air Products uniformly arrived before the delivery of the butyl alcohol cars which were consigned to Air Products by Shell Oil, thereby allowing Air Products to review them before unloading. This flatly contradicts the District Court's findings that:

> "5. Air Products would receive these bills of lading at various times, sometimes before *and sometimes after* the shipment had arrived.
>
> 12. It was not feasible to wait until the bills of lading were received before unloading, because Air

> Products handled about 19 tank cars of isobutanol a month during the relevant period of time.
>
> 13. Since the plant uses this chemical every day, plaintiff cannot allow tank cars to sit idly by and stack up; they must be unloaded for processing and to make room for additional cars." A.3, A.4. Emphasis added.

The railroad's late posting of the bills of lading made it impossible for Air Products employees to simply "consult their file of received bills of lading," as petitioner suggests. The bills of lading, often arrived 2 or three days after delivery of the cars. Trial Tr. 11, 16, 34, 41, 42. Based on the erroneous factual assumption that all bills of lading arrived before railcar deliveries, petitioner next argues that the failure to check a nonexistent file was somehow evidence of Air Products' negligence. The District Court did not agree.

Petitioner also erroneously argues that Air Products' failure to test the contents of the misdelivered car was evidence of negligence. This too contradicts the evidence of record and the conclusions drawn from it by the court below. Air Products did test the contents of all cars marked butyl alcohol to be certain there were no contaminants in the tank cars before unloading. Trial Tr. 22-23, 38-39, 61-62, 64, 88. Air Products did not, however, have the necessary equipment capability to test for a wide range of other chemicals which might be wrongly misdelivered. Trial Tr. 39, 61-62, 64-67, 88. In fact, counsel for the railroad so stipulated at trial. Trial Tr. 89. There was no reason to suspect that such misdelivery had even occurred. The railcars were all identically marked as having originated from Shell Oil, containing "butyl alcohol." There was no feasible way to check way bill numbers in view of the absence of bills of lading arriving before delivery and the sheer volume of railcars being delivered

to the facility. One Air Products witness testified that this facility has received 50 cars of isobutanol in twenty days, not allowing any time to wait for the arrival of bills of lading. Trial Tr. 63. On these facts the district court correctly concluded:

> "6. There was no contributory negligence upon Air Products relating to failure to run extensive chemical analyses of the products prior to unloading. All the railroad had to do was to make the correct delivery and there was no necessity for any chemical analysis. The railroad's contract of carriage calls for it to make correct deliveries." A.7.

The Fifth Circuit expressly affirmed this finding, noting that "without fault on the part of Air Products, which had tested the product for impurities, all four tank cars . . ." were unloaded. A.12.

Petitioner next misdescribes the legal conclusions of the Fifth Circuit to complete its effort to reargue assertions of consignee negligence which were considered and rejected below. Petitioner asserts that since Air Products could not be the holder of the bill of lading on a car it did not order, then "the only possible cause of action Air Products has is a tort action." This completely misstates the pivotal legal holding of the Fifth Circuit that the Carmack Amendment, 49 U.S.C. § 20(11), provides plaintiff's *exclusive* remedy. It also ignores the underlying policies fostered by making the Carmack Amendment the exclusive remedy, as noted by the Fifth Circuit in its opinion. [See A.15, A.17-A.18.] The Fifth Circuit did not hold, as petitioner suggests, that this claim "may lie under either fedral law, the Carmack Amendment or state tort law." It instead agreed with the District Court and held that the Carmack Amendment "provides an *exclusive remedy* for a breach of a contract of carriage provided by a bill of lading . . ." Emphasis added. A.12.

Petitioner simply refuses to acknowledge that misdelivery of "a chemical similar to and indistinguishable in appearance to the chemical ordered by Air Products" does breach its contract of carriage with Air Products, which contract was created by its issuance of a bill of lading to Air Products. A-17. The exclusive remedy for this breach of contract, as described by the Fifth Circuit's opinion, provides that the railroad is responsible for "all foreseeable damages resulting from misdelivery of different cargo than that specified by the bill of lading issued to the damaged consignee. This conclusion, moreover, is in accord with the only other reported decision on the issue cited to us. *American Synthetic Rubber Corporation* v. *Louisville & Nashville Railroad Company*, 422 F.2d 462 (6th Cir. 1970." It is also consistent with earlier district court opinions in *Stroh Brewery Co.* v. *Grand Trunk Western Railroad Company*, 513 F.Supp. 826 (E.D. Mich. 1981) and *Marquette Cement Manufacturing, Co.* v. *Louisville & Nashville Railroad Co.*, 281 F.Supp. 944 (E.D. Tenn. 1967) and, as noted by the Fifth Circuit, is consistent with earlier decisions of this Court from as early as 1916. *Philadelphia & Norfolk Railroad Company* v. *Peninsula Produce Exchange of Maryland*, 240 U.S. 34 (1916); *Adams Express Company* v. *Croninger*, 226 U.S. 491 (1913); and, *Southeastern Express Company* v. *Pastime Amusement Company*, 299 U.S. 28 (1936).

A review by this Court would involve only questions of evidence which have been correctly and fairly made by the trial court based upon substantial evidence presented by Air Products. It should be underscored that the railroad saw fit to undertake *no* discovery of Air Products prior to trial (except for one request to produce the bill of lading for the car *not* ordered by Air Products). The railroad chose to bring *no* witnesses to trial. Petitioner's

entire defense was premised upon its persistent misinterpretation of prior case law, all of which is consistent with Air Products position, as recognized below. It is surprising and improper for the railroad to now seek factual redeterminations by this Court of findings made at a trial petitioner chose not to defend with any railroad witness.

Petitioner's last reargument of the District Court's fact findings is aimed at what is or is not reasonably foreseeable damage, citing this Court back to the time honored case of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854), plus the more modern and relevant decision in *Marquette Cement Manufacturing Co.* v. *The Louisville and Nashville Railroad Company*, 281 F.Supp. 944 (E.D.Tenn. 1967). Again, the outcome of this issue is factually intense and unique to each case, not the proper subject matter for review by this Court. However the distinguishable characteristics of *Marquette* should be mentioned.

In the District Court's opinion it was held that "it was foreseeable to the employees of the railroad in this case that damages such as those sustainted by Air Products could be caused by a misdelivery of product." A.7.

To elaborate on this District Court holding, it is clear that *Marquette Cement* is distinguishable from the case at bar. The damages in *Marquette* were those related to costs incurred *after* Marquette used the wrongly delivered product with its customers. Unlike Air Products, Marquette did not detect the misdelivery before further use of the cargo was made. Instead, the wrongly delivered "air entrained" cement was "delivered to certain job sites in and around Chattanooga" and used in various construction projects by Marquette's customers. The costs of removing and rebuilding the structures damaged

by the wrongly delivered "air entrained" cement were those sought in *Marquette*, not, as in this case, the cost of reconditioning contaminated inventory *before* the wrongly delivered product could do further damage. *Marquette* is simply uninstructive. Despite respondent's efforts to have explained this to the railroad throughout its negotiations with and subsequent suit against the railroad, the Railroad remained adamant in its misapplication of *Marquette* to this case.

Illustrating this point again, the more recent decision of *Stroh Brewery Company* v. *Grand Truck Western Railroad Co.*, 513 F.Supp. 827 (E.D. Mich. 1981), likewise has held that it was not necessary to establish that the railroad have special knowledge of the damages incurred. It was sufficient to hold the railroad liable if the railroad possessed notice of the facts and circumstances which would render the damages probable. 513 F. Supp. at 832. In the *Stroh* case it was known that the railroad "had vast experience in the hauling and delivery of grain." 513 F. Supp. at 830. The same is true of the Illinois Central as to bulk chemicals. It was therefore foreseeable in *Stroh* that a misdelivery of barley, rather than malt, would: a) go undetected in the ordinary course of unloading; and b) would naturally contaminate the inventory of malt with the wrongly delivered barley.

Thus, just as the court in *Stroh* assumed that the railroad's experience in hauling grain made it foreseeable a misdelivery would go undetected and contaminate inventory upon unloading, so Judge Parker assumed the Illinois Central would naturally know that a misdelivery of the wrong bulk chemicals to an operating facility receiving many, many tank cars of isobutanol would contaminate the inventory of that facility when unloaded. Clearly the railroad knew that misdelivery of chemical

"A" would contaminate chemical "B," necessitating, at a minimum, reconditioning costs to correct the contamination so caused.

Nothing Resulting From Denial Of This Petition Will Discourage Safety, Settlements Or Encourage Forum Shopping.

It is indeed ironic that the railroad now complains of the absence of any settlement in this matter. For more than a year after the misdelivery (which occurred in November, 1976), Air Products repeatedly offered to discuss with railroad representatives the evidence substantiating the claim. All offers by Air Products were declined by the railroad. One year and two months after first notice of the claim, the railroad denied liablity for the first time. Perhaps not coincidentally, this first denial of respondent's claim occurred just two months after a negligence claim under Louisiana law would be barred by the Louisiana statute of limitations.

The railroad's denial of the claim was based upon the same legal misinterpretation which has been twice rejected below. Continued efforts to have the railroad make some offer of compromise failed and Air Products, mindful of the two year statute of limitations provided in the Carmack Amendment, initiated suit just before that two year period expired. Suit was commenced in the Northern District of Illinois as a convenience to the railroad, since its corporate headquarters is located in Chicago. Venue considerations seemed relatively unimportant since no factual issues seemed to separate the parties inasmuch as the railroad had never challenged any factual components of Air Products' claim. There seemed to be only a difference of legal opinion as to interpretation of the Carmack Amendment.

The railroad's response to the initiation of the civil action in its home jurisdiction was not to promptly obtain a resolution of the legal issue presented, but rather to file a motion for change of venue, which motion was granted on July 15, 1978. Despite the Illinois District Court's reliance upon the railroads alleged need for witnesses and records in the transferee district (Louisiana), no such pretrial preparation was done and no fact witness was presented by the railroad in the transferee district. Instead the railroad moved to dismiss the case, once transferred to Louisiana, on the basis that the Louisiana negligence claim was barred by the Louisiana statute of limiations. The Fifth Circuit opinion notes that this tactic was unsuccessful and the motion to dismiss was denied. A. 13, fn. 1.

The only delays and forum shopping which are present in this record are associated with the railroad's own conduct, not the existence of a uniform federal claim procedure. There is no explanation of how affirmance of the Fifth Circuit opinion will encourage forum shopping or discourage settlements. The Fifth Circuit opinion will do neither. Now that it is more clear reasonably foreseeable misdelivery damages will be assessed against carriers responsible for such misdelivery, railroads may not so adamantly refuse to meaningfully deal with such claims, as has been Air Product's unfortunate experience in this case. Further, with the Carmack Amendment as the exclusive remedy, forum shopping will be discouraged—not encouraged.

Last it is simply unreasonable to postulate that industrial customers of a railroad will now act unsafely in their railcar unloading procedures simply because they may have a claim for foreseeable damages under the Carmack Amendment. Industrial consignees are in busi-

ness to operate plants safely and efficiently. They are not interested in becoming involved in law suits such as the one at bar, whether under the Carmack Amendment or various state tort laws (even if such tort remedy was not preempted by federal law on this subject as held below).

Judge Rubin's Recusal Was Entirely Proper And Provides No Basis For Rehearing

Not surprisingly petitioner cites no case law to support its request for rehearing by the Fifth Circuit since this novel argument has probably not been raised before. Nor does petitioner explain what prejudice has been caused by such routine recusal.

The statutory provision which is exclusively relied upon by petitioner, 28 U.S.C. § 46(b), seems to have been complied with, not violated, by the Fifth Circuit. The section says nothing about when a judge *must* be recused. The language is permissive, not mandatory. The section states each Circuit may authorize hearings by three judge panels, "unless such judges cannot sit because recused or disqualified." The last sentence simply allows each Circuit the discretion to determine how judges will be rotated to hear a cross section of cases, inferring that the panels may have more than three judges to achieve this purpose, but not less than three. Nothing is said concerning a mandatory requirement of three judges when a proper recusal might reduce that number.

CONCLUSION

Rearguing conclusions of fact accurately and fairly reached on the basis of substantial evidence below provides no basis for review by this Court on petition for

certiorari. There is no conflict between earlier decisions, nor presentation of any viable policy impact of such a routine decision.

For the foregoing reasons, respondent respectfully submits that the petition for certiorari should be denied.

DATED 28 June 1984

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